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NO. 60401-5-I\

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENT OF ERROR

The trial court erred in denying the motion to suppress where the search did not fit within the search incident to arrest exception.

Issue Pertaining to Assignment of Error

Did police illegally search appellant's car under the guise of the search-incident-to-arrest exception to the warrant requirement, where appellant was several steps away from his locked and lawfully parked car at the time of his arrest?

B. STATEMENT OF THE CASE

On September 25, 2006, the King County prosecutor charged appellant Coryell Adams with possessing cocaine. CP 1-4; RCW 69.50.4013. The cocaine was found in Adams' car after he was arrested in a Taco Bell parking lot. CP 1-4.

Adams moved to suppress the cocaine pre-trial on grounds it was the result of an illegal seizure.

> In this case, Mr. Adams was not stopped for any sort of drug related activity. His car . . . did not need to be searched incident to arrest. The doors were locked, the car was legally parked, and he was not able to reach for any weapons that would have jeopardized officer safety. He should have been give[n] the opportunity to have a friend or family member pick up his car and move it. Nothing in the officer's statement of the stop would have necessitated any sort of warrantless exception to allow them to search his car.

CP 16.

A hearing was held on Adams' motion on May 16, 2007 (RP). Deputy Heather Volpe testified that shortly after midnight on May 24, 2006, she noticed Adams sitting in his car in the parking lot of Goldie's Casino in Shoreline. RP 3-4, 15. Volpe ran the car's plates and learned the registered owner had a misdemeanor warrant for driving with a revoked license out of Pierce County. RP 4, 14. Volpe had passed Adams' car, but turned around upon learning of the warrant. RP 16. Adams drove out of the parking lot and turned southbound onto Aurora Avenue. RP 4.

Adams had turned left into Taco Bell and parked by the time Volpe caught up to him. RP 4-5, 19. Although Volpe claimed Adams parked in a handicap stall, Adams testified he did not. RP 6, 39. Volpe pulled in, activated her lights, and parked at a 45 degree angle behind Adams. RP 5-6, 19.

As Volpe exited her patrol car, Adams likewise exited his car. According to Volpe, Adams stood in the swing of the open driver's side door, yelling at Volpe. RP 6. Adams accused Volpe of racial profiling and asserted she had no legitimate reason to contact him. RP 6-7.

Volpe ordered Adams to get back inside his vehicle because he was being stopped for a traffic violation. RP 7. Volpe testified that Adams

slammed his door shut and took 4-5 steps away from the car, stopping in the adjacent parking stall. RP 7-8, 20. According to Volpe, Adams continued yelling. Volpe waited for another deputy to arrive. RP 8, 21.

Volpe had instructed Adams to turn around so she could handcuff him, and was attempting to get him to comply when deputy Wright pulled up. RP 8. Volpe testified that Adams became extremely compliant when Wright arrived and cooperated while the deputies placed him under arrest. RP 8, 23.

Volpe led Adams to the back of her patrol car and searched him, placing Adams' property on her trunk. While Volpe placed Adams in the back of her car and read Adams his rights, Wright took Adams' keys and unlocked his car door. RP 10-11, 24.

When Volpe went to search Adams' car, Wright said he had unlocked the door for her. RP 10, 25. Inside the car in the center console, Volpe saw a small black bag she suspected contained drugs. RP 11. Inside, Volpe found a clear plastic bag containing a white powdery substance, which subsequently tested positive for cocaine. RP 11-12; CP 3.

Volpe called impound to take the car. RP 27. Had it not been parked in a handicap stall, however, Volpe might have left it there. RP

29. Despite Volpe's testimony, the court expressly found Adams did not park in a handicap stall. CP 21-23; RP 65.

Nevertheless, the court upheld Volpe's search of Adams' car under the search incident to arrest exception to the warrant requirement.

> In Thornton versus United States,[1] 158 Lawyer's Edition Second 905, 2004, the police discovered that the vehicle's license did not match the make and model. They followed the vehicle to a parking lot. Before the police had the opportunity to pull the car over the driver parked, got out of the vehicle. Police arrested him, searched the vehicle and found a weapon. The Supreme Court held that at least under the Fourth Amendment the police may search the entire passenger compartment whether or not the arrestee was in the car when the stop was made. As long as he was a recent occupant.
>
> Here the Court has found that the defendant was a recent occupant of the vehicle. Police were authorized to stop the car because of the warrant. I conclude that a driver can't defeat a search incident to arrest by getting out of the car, closing the door, and locking it. When first, the driver was seen in the car driving it. Second, where the arrest was very close in time and space to the driving of the vehicle.

RP (5/16/07) 68-69; see also CP 21-23.

Adams agreed to a stipulated bench trial and was convicted as charged. CP 24-25. At sentencing on July 27, 2007, the court imposed a standard range sentence. CP 27-34. Adams timely appealed. CP 35-43.

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[1] Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

C. ARGUMENT

THE COCAINE WAS FRUIT OF AN ILLEGAL SEARCH AND SHOULD HAVE BEEN SUPPRESSED.

The Fourth Amendment and article 1, § 7 of the Washington Constitution prohibit unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Const. Art. 1, § 7; State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000). "Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (citing Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)) (internal quotations omitted). The state bears the burden of showing a search or seizure without a warrant falls within one of these exceptions. Kinzy, 141 Wn.2d at 384.

One such exception is a search incident to a valid arrest. In Chimel v. California, the Supreme Court held that incident to a lawful arrest, the police may search the area within the arrestee's "immediate control" or the area into which the arrestee might reach to grab a weapon or destroy evidence. Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). In New York v. Belton, the Court expanded its

holding in Chimel and articulated the "bright-line rule" that when an arrestee is occupying an automobile at the time of arrest, the police may search the vehicle's entire passenger compartment incident to the arrest. New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

Following the Court's ruling in Belton, however, federal and state courts disagreed regarding the scope of an automobile search incident to arrest when the suspect was not occupying the vehicle at the time of arrest. State v. Rathbun, 124 Wn. App. 372, 376, 101 P.3d 119 (2004). Some courts applied the "immediate control" standard articulated in Chimel, while others permitted a Belton search incident to the arrest of a recent occupant that occurs near the vehicle. Rathbun, 124 Wn. App. at 376 n.1 (citing State v. Porter, 102 Wn. App. 327, 333 n.6, 6 P.3d 1245 (2000)).

The Supreme Court finally addressed the issue in Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). There, the defendant parked his car and exited the vehicle before the police could pull him over and arrest him. Thornton, 541 U.S. at 615. The officer arrested the defendant near the vehicle and searched his car incident to arrest. Thornton, 541 U.S. at 615. The court upheld the search, holding that "Belton allows the police to search the passenger compartment of a

vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants' of the vehicle. Thornton, 541 U.S. at 622.

The court reasoned that "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." Thornton, 541 U.S. at 621. According to the Court:

> The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.

Thornton, at 621.

Nevertheless, the Thornton Court limited the scope of such a search, stating: "an arrestee's status as a 'recent occupant' may turn on his *temporal or spatial relationship to the car at the time of the arrest and search.*" Thornton, at 622. (emphasis added).

In Washington, the seminal case addressing the scope of a search incident to arrest is State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). There, police officers observed a parked vehicle next to a vending machine in a closed gas station. The headlights were on and the car's engine was running. One of the defendants, Billy Stroud, was standing beside the

vending machine, while the other defendant, Herbert Lee Caywood, stood in the swing of the open passenger door, a couple of feet away from Stroud. Stroud, 106 Wn.2d at 145.

When officers arrived, the door of the vending machine appeared to be open. Upon seeing the officers, Stroud shut the door and grabbed a key from the vending machine door lock. At the officers' request, Stroud handed over a homemade key, apparently designed to open vending machine locks. When officers frisked both defendants, they found a second homemade key in Stroud's possession and several dollars worth of change in Caywood's coat pocket. The officers arrested the defendants for theft and placed them in the back of the patrol car. Id.

One of the officers subsequently looked into the defendants' car and saw a revolver on the backseat. The officer seized the weapon and searched the entire passenger compartment, including an unzipped luggage bag, which contained drugs and a shotgun. Id., at 146. Following the trial court's denial of their motion to suppress, Stroud and Caywood were convicted of unlawfully possessing drugs and firearms. Id.

On review, the Supreme Court upheld the search of the car, adopting a bright-line rule akin to that articulated in Belton:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and

> placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for destructible evidence.

Stroud, 106 Wn.2d at 152.

Unlike Belton, however, our state Supreme Court declined to extend the permissible scope of the search to locked containers within the passenger compartment, in part because the exigencies did not so require:

> [T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container. This rule will more adequately address the needs of officers and privacy interests of individuals[.]

Stroud, at 152-53.

Although Stroud made no apparent distinction between occupants and *recent* occupants, its holding has been construed narrowly. State v. Fore, 56 Wn. App. 339, 347, 783 P.2d 626 (1989). In Fore, this Court recognized that the validity of a search under Stroud did not depend on the arrestee being in the vehicle when police arrive. Neither Stroud nor Caywood was in the car when police arrived and both were physically restrained in the police car at the time of the search. But this Court also recognized:

> Nonetheless, Stroud indicates that a valid vehicle search incident to arrest requires a close physical and temporal proximity between the arrest and the search.[2] . . . Although the required degree of proximity is not subject to the same type of "bright-line" analysis as the general rule itself, subsequent decisions have construed Stroud narrowly.

Fore, 56 Wn. App. at 347; see also State v. Porter, 102 Wn. App. at 334 (recognizing case-by-case analysis required).

Thus, the general rule in Washington is that an officer may search a vehicle if it is within the area of the suspect's "immediate control" at the time of his or her arrest. See, e.g., State v. Porter, 102 Wn. App. at 334 (search of defendant's van incident to her son's arrest impermissible because the son had walked 300 feet away from the vehicle and thus, did not have immediate control over the vehicle); Rathbun, 124 Wn. App. at 378 (truck not within Rathbun's immediate control where he was 40-60 feet away at

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[2] For example, in upholding the search in Stroud, the Supreme Court stated:

> When applying this rule to the facts of this case, the result is clear. Defendants Stroud and Caywood were lawfully arrested next to their car while the door was still open. The car's engine was running and a gun was located in plain view on the back seat. The officers would be entitled to enter the car without a warrant to retrieve the gun, both under the rule described above, as well as a "lain view" exception to the warrant requirement.

Stroud, 106 Wn.2d at 153.

the time of arrest). The "key question" in applying Belton and Stroud is whether the arrestee had ready access to the passenger compartment at the time of arrest. For instance,

> If he could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest. Sometimes, this is referred to as having "immediate control" of the compartment.

State v. Johnston, 107 Wn. App. 280, 285-86, 28 P.3d 775 (2001), review denied, 145 Wn.2d 1021, 41 P.3d 483 (2002).

The facts of this case most closely resemble those in State v. Perea, 85 Wn. App. 339, 932 P.2d 1258 (1997). An officer who was aware Perea had a suspended driver's license saw Perea driving and radioed another officer to stop him. Officer Wise caught up with Perea just as Perea pulled into the front yard of his house. Perea, 85 Wn. App. at 341.

Wise activated his emergency lights and pulled in behind Perea. Wise saw Perea turn and look in the direction of Wise's vehicle and then immediately step out of his vehicle and close the door very quickly. Officer Wise ordered Perea back to his car, but Perea started to walk toward the house, ignoring Wise's second order to return to the vehicle. By then the first officer had arrived and both officers advised Perea he was under arrest. The police handcuffed Perea, confiscated his keys and put him into the

patrol car. Subsequently, one officer proceeded to verify by a records check that Perea's license was suspended, while the other officer used Perea's car keys to unlock and search the car. A loaded pistol was found under the front seat. Perea, 85 Wn. App. 341. Perea was convicted of unlawfully possessing a firearm. Perea, 85 Wn. App. at 340.

On appeal, Perea argued the trial court erred in finding that the police validly searched his locked vehicle incident to arrest. Perea, 85 Wn. App. 343. At the outset, the court recognized that "[h]ad Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested, Stroud's bright-line rule would have permitted a search of the passenger compartment of the vehicle." Perea, 85 Wn. App. at 344.

Under the circumstances of Perea's case, however, the court concluded the search was not reasonable. In part, the court's decision was based on its conclusion that Perea acted lawfully when he locked the car door, because he was not seized at that point. Perea, 85 Wn. App. 339 (citing California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (seizure does not occur until the suspect submits to a show of authority or is physically touched by the officer)). The continued validity of this part of Perea's holding is questionable, however, since our state Supreme Court has declined to follow Hodari D. State v. Young, 135

Wn.2d 498, 501-05, 510, 957 P.2d 681 (1998). Moreover, immediately after holding that Perea was not "seized" when he locked his door, the court incongruously notes, he "was not free to leave the scene, and by going toward his house he could have been charged with obstructing a public servant in the performance of his duties[.]" Perea, at 344.

Regardless, in reversing the trial court's decision, the court relied significantly on the fact the car was locked at the time of Perea's seizure:

> We could find no case where officers were permitted to enter a locked car to perform a search incident to arrest. This is not an exigent circumstances case, or a community caretaking case, or the seizure of evidence case. This is not a case where the defendant locked his car after seizure (either directly or by a remote device), or even after disobeying a direction of the police officer to remain inside his vehicle. Rather, this is a warrantless search of a lawfully parked and locked car, without probable cause. As such, it was not authorized by Stroud's bright line rule, even though the defendant was validly arrested nearby.

Perea, 85 Wn. App. at 345.

Ultimately, the result reached in Perea is consistent with Stroud and its progeny. Because Perea's car was locked, it presented the same degree of danger to officers as a locked container within the car, i.e. very little. Moreover, even if Perea's car were unlocked, he had walked away and no longer exercised immediate control over it. In short, the exigencies did not require that police be allowed to search the car without a warrant.

The same is true here. Adams' car was locked, and Adams was several steps away from it at the time of his arrest. As in Perea, the exigencies did not require that police be allowed to search the car without a warrant. Although the court here reasoned that Adams should not be able to defeat a search incident to arrest by exiting the car and locking the door, this reasoning indicates a grave misunderstanding as to the policy justification for allowing police to search a car incident to arrest. In Rathburn, the state made a similar argument, which Division Two properly rejected:

> As noted previously, the policy underlying a vehicle search incident to arrest pursuant to Chimel and Belton is to prevent the destruction of evidence and protect police from danger. Thornton, 541 U.S. at __, 124 S. Ct. at 2131. Contrary to the State's position, the ability to search a vehicle incident to the arrest of a vehicle's occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle. If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a warrant.

Rathburn, 124 Wn. App. at 380. The trial court therefore erred in invoking such a rationale to uphold the search where the contents of the car clearly did not present a danger to the officers.

In support of the trial court's ruling, the state may cite to State v. O'Neill, 110 Wn. App. 604, 43 P.3d 522 (2002). Any proposed similarity between that case and Adams' should be rejected, however. Unlike Adams, O'Neill was occupying his vehicle at the time of his arrest. O'Neill, 110 Wn. App. at 606-07, 610. Accordingly, Belton's bright-line rule permitted police to search the vehicle, regardless of whether O'Neill locked the door when police ordered him to get out of the car. In this case, Adams was outside of his lawfully parked and locked car at the time of his arrest. Belton's bright line rule is inapplicable here.

D. CONCLUSION

The trial court's order denying the motion to suppress should be reversed. When the evidence obtained through the illegal search is properly excluded, there is no evidence to support the charge. Accordingly, the

conviction should be reversed and dismissed. See, e.g., State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

DATED this 31st day of January, 2008.

Respectfully submitted,

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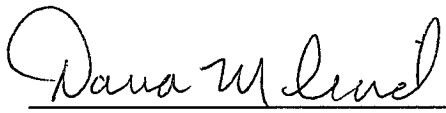

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